United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7313

ORIGINAL

To be argued by
RAYMOND P. O'KEEFE

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

p/s

G & S DEVELOPMENT CORPORATION, FRANK J. GRESKOVICH and BENJAMIN L. STALNAKER,

Plaintiffs-Appellants,

—against—

LINCOLN FIRST REAL ESTATE CREDIT CORP. and NATIONAL BANK OF WESTCHESTER,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

McCARTHY, FINGAR, DONOVAN & GLATTHAAR
Attorneys for Defendants-Appellees
175 Main Street
White Plains, New York 10601
(914) 946-3700

RAYMOND P. O'KEEFE
ROBERT M. REDIS
Of Counsel

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Statement of the Case

This is an action for damages and other relief arising out of the failure of two mortgage loan commitment contracts in the aggregate amount of $12,000,000 for the construction and permanent financing of a project in Florida, to close. Defendants counterclaimed on the $300,000 promissory note made by the corporate plaintiff and on the guarantee of the individual plaintiffs to National Bank of Westchester (hereinafter "NBW").

Proceedings Below

The plaintiffs commenced an action for damages for an alleged breach of contract and for specific performance of the contracts to loan money. The claim for specific performance was abandoned during the trial (151A).* As a result of the abandonment of the project, the plaintiff sought damages in the nature of its expenses in attempting to obtain the permanent takeout loan and in attempting to obtain substitute financing. The plaintiffs also sought the return of the $180,000 "non-refundable" fee and the cancellation of the $300,000 promissory note and guarantees (17A-18A, 3-4 of Plaintiffs' brief). The defendants counterclaimed for the unpaid principal balance on the note and on the guarantees (10a, 11a).

Following the opening statements and the offers of proof, the defendants moved for a directed judgment dismissing the complaint and for judgment on the counterclaims (266A-267A). The Hon. Irving Ben Cooper granted the motion and directed judgment for the defendants. Judge Cooper's decision was based upon his rulings of law, made after 2 days of intensive argument on specific questions of law and extensive offers of proof (165A-285A).

Judge Cooper upheld the defendants' contention that the parol evidence rule barred the introduction of the alleged oral representation of R. W. Pollitt (hereinafter "Pollitt") that the condition of the loan requiring Screening Committee approval had been either waived or satisfied (275A-276A). Judge Cooper held that the commitment letters dated December 26, 1973 were binding contracts and that

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* References bearing the suffix "A" are to plaintiffs' appendix. Reference to the suffix "a" are to a defendants' supplemental appendix. References to "Rec. D" followed by a number are to documents contained in the Record on Appeal.

the oral evidence sought to be introduced would have the direct effect of contradicting, varying and subtracting from those agreements (276A). Additionally, the Court decided that a contract to lend money secured by a mortgage on real property is within the penumbra of the Statute of Frauds, New York General Obligations Law §5-703, and an oral agreement changing or modifying the terms of this agreement would be invalid and ineffective (277A). In so holding the Court expressly rejected the authorities cited in the plaintiffs' supplemental affidavit, which was served on the second day of the trial (277A). The Court held that the word "approval" was not ambiguous and that *Imperator Realty Company* v. *Tull,* 228 N.Y. 447 (1920), was clearly distinguishable on its facts from the present case (278A-279A). Judge Cooper also rejected the plaintiffs' argument of equitable estoppel. Judge Cooper said, "In the present case the pleadings are barren, absolutely barren of any allegations of fraud, misrepresentation, deception or infringement of law on any phase relating to the total claim" (281A).

With respect to the $180,000, non-refundable commitment fee, the Court ruled that the defendant was entitled to retain this sum on the grounds that this fee was earned when the December 26, 1973 commitments were accepted. It was the consideration paid for the issuance of the commitments (280A). It was the bargained-for consideration and the Court would not inquire into the adequacy of the consideration (280A).

As to the defendants' counterclaims, the Court held the promissory note and guarantees to be clear, unambiguous and definite on their face and that parol evidence of the alleged prior or contemporaneous representations would, as a matter of law, be inadmissible (282A). Furthermore, the note used by the bank prohibits any waiver or modification unless in writing and New York General Obliga-

tions Law §15-301 gives effect to such a provision (282A). Lastly, the Court held that the individual guarantors had no defense to their guarantees (283A).

Statement of Facts

This is an appeal from a judgment of the United States District Court for the Southern District of New York, (Hon. Irving Ben Cooper), directing a verdict dismissing plaintiffs-appellants' (hereinafter "plaintiffs") complaint and awarding defendants-appellees (hereinafter "defendants") Lincoln First Real Estate Credit Corp. (hereinafter "LFRECC") and NBW judgment on their counterclaims.

This is an action for damages and other relief arising out of the alleged breach of two mortgage loan commitment contracts for construction and permanent financing of a proposed profit-making hospital in Pensacola, Florida. The allegations in the complaint are that G&S Development Corp. (hereinafter "G&S"), commenced negotiations with LFRECC to obtain a construction loan secured by real property and the building to be erected thereon (7A). After preliminary negotiations LFRECC, on December 3, 1973, sent a letter to G&S notifying it that LFRECC had received its application for a loan and would commence processing the application (19A). The letter of December 3, 1973 enumerated the bare outlines of the loan application and informed G&S that, among other things, LFRECC required a "non-refundable commitment fee" in the amount of $20,000 and that final approval of the loan was subject to the approval of the Executive Loan Screening Committee (19A). The letter requested that if G&S found these terms acceptable that it should sign and return the letter together with $20,000 which was the "non-refundable" commitment fee called for (20A). The plaintiff, acting through

its President Richard H. Crowe, (hereinafter "Crowe"), a New York attorney, signed an acceptance of the terms of this letter and transmitted the "non-refundable fee" to LFRECC (8A, 71A).

On or about December 27, 1973 a meeting was held at the offices of the LFRECC, attended by Royal W. Pollitt, Jr. (hereinafter "Pollitt"), a senior Vice President of LFRECC, J. Brian Bergen, a former Vice President of LFRECC, and John Muhlfeld, a former employee of LFRECC. In attendance for the plaintiffs, were Crowe, the attorney and President of G&S Development Corp., and Dr. Benjamin L. Stalnaker M.D. (hereinafter "Stalnaker") (8A). At this meeting, the plaintiffs were presented with three letters. The first letter was a transmittal letter enclosing the two mortgage commitments in the aggregate sum of $12,000,000. The transmittal letter requested that the plaintiffs read the terms of each commitment carefully. The letter also instructed the plaintiffs that upon acceptance of the two commitments by G&S that there was "due" a "non-refundable" commitment fee in the sum of $180,000 ($20,000 of which had been received). The transmittal letter further stated that "this $180,000 fee is hereby earned and should, for any reason, this loan fail to close, will be retained by Lincoln First Real Estate Credit Corporation as liquidated damages" (27A).

The second and third letters, which were presented to attorney Crowe and Stalnaker, were the construction loan commitment in the amount of $6,000,000 and the stand-by commitment for a permanent loan also in the amount of $6,000,000 (9A; 21A-26A). Both of these commitments indisputedly contained a number of conditions which had to be fulfilled prior to the consummation of the loan transaction (74A). The major condition of the construction loan commitment was that the loan had to be approved by the Executive Loan Screening Committee (9A,

22A). This was the same condition contained in the December 3, 1973 letter (19A). The stand-by commitment likewise contained a number of conditions, one of which was the closing of the construction loan in accordance with the terms of the construction loan commitment (26A). The plaintiffs allege that at the meeting of December 27, the various terms of the commitments were discussed. Plaintiffs claim its attorney, Crowe, asked Pollitt about the condition of the construction loan commitment requiring Executive Loan Screening Committee approval of the loan before signing and accepting the commitments (74A, 144A, 174A). Plaintiffs allege that Pollitt told them that the loan had been approved but that the Executive Loan Screening Committee had not met yet (74A, 144A, 174A).

The plaintiffs allege, following this alleged representation, that other conditions of the loan were discussed. In fact there was a change made in the stand-by commitment. This change in a minor condition modifying the number of parking spaces required was physically struck from the letter, the new number careted in and the change initialled by Crowe and Pollitt (24A, 30a). No such change was made in the condition of the construction loan commitment requiring Executive Loan Screening Committee approval (30a, 21A-23A). Thereafter Crowe, the president and attorney of G&S, signed and accepted the commitments and paid the remainder of the $180,000 "non-refundable" fee (9A, 74A, 144A, 174A). The defendants deny that any such representation was made by Pollitt or any one else on behalf of LFRECC (2a).

Plaintiffs allege that after their acceptance of the two commitments they asked Pollitt to approve an initial $300,000 first advance on the proposed loans to be loaned to G&S (10A). The plaintiffs claim that they needed this money prior to December 31, 1973 to pay for work, labor and materials which had already been spent on the pro-

posed project and for income tax purposes (142A, 144A). Pollitt told them that LFRECC could only make real estate loans and that the loan could not be closed prior to the end of the year. Plaintiffs claim that they told Pollitt that they were "dearly in need of money" and that Pollitt told them to borrow the money in Florida (144A). The plaintiffs allegedly told Pollitt that they could not do this (146A) and that, at G&S's request, Pollitt called NBW to introduce G&S to NBW (146A). NBW and LFRECC are separate and distinct entities governed by a separate Board of Directors. Each is a wholly-owned subsidiary of Lincoln First Bank, Inc. (5a, 221A, 225A).

At G&S's request, Pollitt allegedly called NBW and said to the person on the telephone, I have two doctors here. We entered into a commitment letter. It hasn't been approved. Will you lend them the money until the closing (146A). Plaintiffs then went to NBW and met with a vice president in the commercial loan department. After evaluating their loan application and reviewing the financial statements, NBW agreed to loan G&S $300,000 on a short-term promissory note on its standard form personally guaranteed by Stalnaker and Dr. Frank L. Greskovich (hereinafter "Greskovich"). G&S executed the $300,000 note by its attorney and President Crowe (10A, 13a) and the loan was guaranteed individually by Stalnaker and Greskovich, the latter by a power of attorney executed in favor of Crowe. The plaintiffs allege that prior to making the loan they said to the bank "Don't give us the loan of the $300,000 unless we are going to get the construction mortgage because we can't pay you back" (237A). Thereafter the $300,000 was transmitted to G&S by NBW.

The defendants deny that any such statement was made. The $300,000 promissory note and guarantees contained

all the conditions and representations of this loan. The defendants deny that this loan was made on any representations or conditions not contained in the documents themselves. The defendants' position is that the $300,000 loan was made on an independent evaluation of the financial condition of the corporate borrower and the two doctors who were guaranteeing the indebtedness. Considering the short term of the note (60 days) the bank decided to loan the money.

On January 15, 1974, after acceptance of the commitments, LFRECC's Executive Loan Screening Committee met to consider the loan but withheld approval of the construction loan until a permanent take-out mortgage commitment was obtained from a financially responsible lending institution satisfactory to LFRECC (R 10, 7a, 37A, 148A, 224A). The Executive Loan Screening Committee is comprised of individuals who are not employees, officers or directors of LFRECC. It is an independent body set up to review loan applications and to monitor the sometimes overzealousness of LFRECC's mortgage officers (142A, 209A, 221A, 225A). The plaintiffs were informed of the Executive Loan Screening Committee's decision (148A, 194A). The plaintiffs never obtained a firm takeout, the other conditions of the commitments were not complied with and the commitments expired by their terms (7a-8a, 37a-38a).

The $300,000 short term note of the bank matured. Demand for payment was made on and received by the plaintiffs on this note and the guarantees but no payment was made by any plaintiff after the demand (11a, 28A, 29A, 38a). Following maturity of the note and the failure to pay the unpaid principal balance of the note, LFRECC purchased the note from NBW (10a).

ARGUMENT

POINT I

The letter agreements dated December 26, 1973 were expressly made subject to a number of conditions precedent which were not fulfilled, and thus LFRECC's obligation to fund the loans did not arise.

The letter agreements dated December 26, 1973 from LFRECC to G&S (21A-27A) contain the entire agreement of the parties with respect to the construction and stand-by mortgage loan commitments to be secured by a mortgage on real estate. The construction loan agreement, provides *inter alia* as follows:

> "This loan has been approved, *subject to the following conditions:*
>
> 1. Title insurance survey and all other legal documents used in connection with this loan are to be approved by counsel for Lincoln First Real Estate Credit Corporation.
>
> 2. A confirmatory M.A.I. appraisal satisfactory to Lincoln First Real Estate Credit Corporation.
>
> 3. *Executive Loan Screening Committee approval.*
>
> 4. Audited financial statements of the borrowing corporation and the principals thereof.
>
> 5. Compliance with all regulations, ordinances, etc. promulgated by any governmental agency, department or subdivision, and any and all amendments thereto.
>
> 6. Fire insurance with extended coverage and other hazard insurance in the amount and by companies acceptable to us.

7. Agreement by the participating banks to participate in this loan and execution of a participation and servicing agreement.

8. With the exception of attorneys' fees, all other fees and expenses incidental to this transaction shall be borne by you; you shall pay all closing costs including but not limited to mortgage tax, mortgagee's title insurance premium, recording fees and appraisal fees.

9. Compliance with all terms and conditions of the permanent loan commitment issued by Lincoln First Real Estate Credit Corporation of even date herewith.

10. Approval of the proposed administrator.

11. This commitment shall be null and void if the loan transaction is not closed on or before April 1, 1974.

12. A performance and completion bond issued by a company acceptable to us in an amount of not less than $5,000,000.

13. Final plans and specifications must be approved by our designated architects. Inspection fees of our architects are to be paid by you." (emphasis supplied)

The obligation on the part of LFRECC to fund the loans, clearly expressed in this agreement, was not to arise unless and until each and every of these 13 conditions was complied with.

These terms were, as a matter of law, conditions precedent, i.e., requirements which must be fulfilled before a duty of immediate performance arises on the promise which the condition qualifies. *Axelrath* v. *Spencer Kellogg*

& Sons, Inc. (1943) 33 N.Y.S. 2d 94 (N.O.R.), *aff'd,* 265 A.D. 874, *aff'd,* 290 N.Y. 767 (1943). Legal obligations arise only after satisfaction of the conditions. *Wood & Selick* v. *Ball,* 190 N.Y. 217 (1907); *Boro Motors Corp.* v. *Century Motor Sales Corp.*, 18 Misc. 2d 1009, (Sup. Ct. Kings 1959); *Hershey* v. *Carter,* 137 N.Y.S. 2d 207 (N.O.R.) (Sup. Ct. New York 1954).

The defendant LFRECC had the right to qualify and condition its performance on any conditions it wanted. There is no allegation of fraud, bad faith or coercion in the pleadings and there is no presumption of fraud in New York *Wilhelm* v. *Wood,* 151 App. Div. [illegible], (2nd Dept. 1912). Plaintiffs' counsel specifically withdrew any charge of fraud from the case (177A, 187A, 195A, 281A). The President of G & S was a New York lawyer (7A, 71A). There was a market for the amount of money G & S wished to borrow; numerous lenders were in competition with one another for loans of this size at that time. This competition placed the parties at equal bargaining strength.

LFRECC had the absolute right to make the transaction and its performance subject to any state of facts, events, conditions or occurrences it might name and, when these were accepted by G & S, the only obligation on its part was not to interfere with the performance of the conditions. One of these conditions was that the loan was subject to approval by LFRECC's Executive Loan Screening Committee; this condition also appeared in the December 3, 1973 letter (19A). This Screening Committee is a totally independent body whose function it is to objectively review loan commitments (142A, 209A, 221A, 225A). There is no allegation that LFRECC interfered with or pressured the Committee to disapprove the loan. It never guaranteed that the conditions would be satisfied. What money, if any, expended by G & S on the strength of the

clearly qualified, conditional commitment was done so at its own peril. It assumed the risk that all the conditions precedent would be satisfied (221A). *Wilhelm* v. *Wood, supra; Atkins* v. *Trowbridge,* 162 App. Div. 629 (1st Dept. 1914); *Alderman* v. *Central New York Arterial Markets, Inc.,* 24 AD 2d 1046 (3rd Dept. 1965).

The plaintiffs acknowledge that the conditions precedent were never in fact fulfilled. Their contention is that the Cordova Hospital project was "formally submitted to the Loan Screening Committee on January 15, 1974" (37A). The Loan Screening Committee met and decided not to approve the loan until a firm, permanent take-out from an independent, financially responsible institution acceptable to LFRECC was obtained (148A, 224A). Since this, like other conditions precedent, was never complied with, LFRECC's duty to fund the construction loan never came into existence.

Likewise, the stand-by commitment agreement dated December 26, 1973, was also an agreement subject to numerous conditions precedent. It provided *inter alia* as follows:

> "The loan commitment as contained herein *is subject to the following express terms and conditions:*
>
> 1. Approval of title and all documents and papers by our attorneys, McCarthy, Fingar, Gaynor & Donovan, 175 Main Street, White Plains, New York.
>
> 2. Receipt at the closing of a policy of title insurance in loan amount on the American Title Association Revised Coverage form issued by a title company approved by us, containing no exceptions other than those approved by us.
>
> 3. We are to receive and approve a currently dated survey of the parcel or parcels to be

mortgaged, certified to by a registered land surveyor, showing the dimensions and total square foot area of the plot, the dimensions and location of all improvements and easements, the locations of adjoining streets and the distance to and name of the nearest intersecting streets.

4. All outstanding taxes and assessments affecting any of the security for this loan due and/or payable on the date of the closing shall be paid.

5. The loan will be evidenced by your notes in the amount of $6,000,000 which shall be modified and extended to incorporate the terms of this agreement, secured by a first mortgage lien which shall encumber the real estate, buildings and improvements located thereon, and all fixtures and articles of personal property affixed by you or to be used by you in connection with the operation of said premises, buildings and improvements. All of the guarantees, collateral and restrictive provisions in effect during the construction loan period shall continue effective during the term of the permanent loan.

6. We are to be furnished with original paid up fire insurance policies of companies acceptable to us containing the non-contributory New York Standard Mortgagee Clause in our favor. Said policies are to be for three years or more and be in amounts based on an insurable value of $9,500,000.

7. The mortgage papers will provide for payment of late charges in the amount of four (4¢) cents per dollar on all payments made fifteen (15) days or more after their due date.

8. The mortgage shall contain a provision permitting the mortgagor to prepay the loan in whole or in part at any time without payment of a prepayment fee or charge of any kind after ninety (90) days prior written notice.

9. This commitment shall be null and void if the loan transaction is not closed on or before the expiration of our construction loan, as the same may be extended. In the event our construction loan mortgage is paid in full, this commitment shall automatically terminate and have no further force and effect.

10. Funds are to be advanced upon the satisfactory completion of the building in accordance with the plans and specifications submitted to Lincoln First Real Estate Credit Corporation, and receipt by us of the certificate of occupancy and fire underwriters certificate.

11. Any and all licenses, permits and consents of any governmental authority which are necessary to open the new addition for use as a hospital facility shall be received and copies thereof delivered to us prior to closing."

In addition to such conditions precedent, the letter further provided that:

> "If the construction loan committed for simultaneously herewith is not closed pursuant to its terms, this commitment shall automatically terminate and have no further force and effect." (26A)

Thus the stand-by permanent commitment was expressly conditioned upon the plaintiffs *closing* of the construction loan according to the terms of the construction loan com-

mitment. Since the construction loan was never closed by plaintiff, the defendant's obligation to perform under the stand-by commitment never arose.

Through no fault of the defendants, the conditions precedent to each of the commitments were not fulfilled and therefore LFRECC's obligation to *fund* the loans never arose. Consequently, LFRECC cannot be liable in damages. The Court therefore properly directed a verdict for the defendants on this point.

POINT II

Parol evidence is inadmissible to contradict the agreements dated December 26, 1973.

As shown in Point I, the agreements of December 26, 1973 were subject to conditions precedent, which conditions were never fulfilled. The plaintiffs argue that, prior to and contemporaneously with the execution of these agreements, Pollitt stated that the condition of the loan requiring Executive Loan Screening approval had been either satisfied or waived (9A, 144A, 174A).

The commitments were delivered and accepted on December 27, 1973 at a meeting held at LFRECC's offices attended by Crowe, Stalnaker, Pollitt, Bergen and Muhlfeld (8A). According to the plaintiffs, the various terms of the commitments were discussed prior to acceptance (144A). The condition of the stand-by commitment requiring 400 parking spaces was changed to 200 parking spaces and this change was initialled by Crowe and Pollitt (24A). The plaintiffs claim that they then asked about the condition requiring Loan Screening Committee approval and that Pollitt told them this condition was either waived or satisfied (9A, 144A, 174A) even though plain-

tiffs admit that they knew that the committee had not formally met (144A, 221A). Despite the fact that Crowe is an attorney, admitted to practice in New York, despite the fact that they were about to accept two commitments in the total amount of $12,000,000 and pay a $180,000 commitment fee, which by its terms was "non-refundable", no change or modification was made in this condition. The plaintiffs made certain that the number of parking spaces were changed and initialled this change but did absolutely nothing with regard to the more crucial condition requiring Loan Screening Committee approval. The words of the Appellate Division, First Department in *Humble Oil & Refining Company* v. *Jaybert Caso Service Station, Inc.*, 30 A.D. 2d 952 (1st Dept. 1968), in a case involving alleged fraudulent misrepresentations as to the contents of a guarantee clearly fit this case. The Appellate Division in excluding the parol evidence offered, said at p. 952:

> "We find it incredible that this sophisticated businessman relied on the alleged misrepresentations. Since the written instrument contains terms different from those allegedly orally represented, and Block is presumed to have read the writing he may not claim he relied on the representations."

The parol evidence rule is a rule founded in reason and common sense. It is a rule intended to control the evidence on which a jury may rule. The rule is based upon the assumption that parties to a written contract wish to place themselves beyond the uncertainties of oral testimony (168A). In its application the court will not allow such parol evidence where it is commercially incredible to think that the alleged oral representation was made. *Meadow Brook Nat. Bank* v. *Bzura,* 20 A.D. 2d 287 (1st Dep't 1964). At page 290 of *Bzura, supra,* the Appellate Division stated:

"On this analysis it is not necessary to reach the bank's cogent contention that the guarantor's assertions are sham for sheer incredibility, namely, that the parties in a lawyer's office, executing documents would permit a most critical condition to rest in oral exchange alone . . ."

The language of these agreements leaves no doubt that the writings are complete, integrated, unambiguous and unequivocal. No recourse need be had to anything else in order to determine the meaning and intent of the parties. There is no ambiguity latent or patent within the writings. These writings obviously mean exactly what they purport to say, i.e., that LFRECC would make the loan only after all of the stated, express conditions were complied with. They are the complete, total agreement and understanding of the parties (277A-278A).

It is the long-settled law in the State of New York that, when the parties to an agreement have memorialized their understandings in a writing, the parol evidence rule forbids the introduction of evidence of any prior oral or written agreement or of any contemporaneous oral agreement which is offered to contradict, vary, add to, or subtract from the terms of the writing. *Thomas* v. *Scutt,* 127 N.Y. 133 (1891).

The plaintiffs try to avoid this ancient rule by arguing that the condition requiring Executive Loan Screening Committee approval was, in effect, no longer a condition to the contract once the officer of LFRECC allegedly notified them that this condition was either satisfied or waived (38A). This proposition is totally without merit.

For this legal argument, we pass over the fact that LFRECC vigorously denies the fact that any such statement was made by its officers (3a, 4a, 55a). Even if it were made, any testimony offered to show that such a

statement was made is barred as a matter of law. The parol evidence in New York is more than a rule of evidence. It is a rule of substantive contract law which defines the limits of the contract. *Fogelson* v. *Rackfay Const. Co.*, 300 N.Y. 334 (1950); *Higgs* v. *DeMaziroff*, 263 N.Y. 473 (1934).

Any such alleged oral statement, to the effect that the condition requiring Screening Committee approval of the loan had been satisfied or waived, made prior to or contemporaneously with the issuance and acceptance of the December 26, 1973 letter agreements, both contradicts and negates the written condition of Screening Committee approval. It is logically inconsistent and semantically impossible for both the written condition requiring the Executive Loan Screening Committee approval and the alleged oral statement that it was either waived or satisfied, to exist at the same time. Thus the parol evidence rule is a bar to any testimony of this alleged oral representation. *Fadex* v. *Crown*, 272 App. Div. 273 (1st Dept. 1947), *reversing* 189 Misc. 611 (1947), *aff'd* 297 N.Y. 903 (1948). In *Fadex* v. *Crown, supra,* the plaintiff contended that the alleged oral statement of a condition created no triable issue of fact because it was inconsistent with the written instrument and hence not provable under the parol evidence rule. The question certified was answered in the affirmative, thus upholding the plaintiffs' contention as a matter of law. In *Fogelson* v. *Rackfay Const. Co., supra,* p. 338 the Court of Appeals stated the test of whether or not parol evidence is admissible, is as follows:

> "In general, an oral agreement may be proved only if it is not so clearly . . . connected with the principal transaction as to be part and parcel of it . . . in the end the court must find the limits of the integration as best it may by reading the writing in the light of surrounding circumstances, and by

> determining whether or not the agreement was one which the parties would ordinarily be expected to embody in the writing".

Application of this test to the facts of the present case, leads to the inescapable conclusion that the parol evidence rule bars any testimony of a representation that the condition requiring Loan Screening Committee approval was either waived or satisfied, because the commitment as executed and accepted contains the condition that the approval must, in the future, be obtained (21A-23A). Thus the condition is in the writing and the alleged oral representation would be inconsistent with the writing.

The letter agreements expressed the entire intention of the parties on this matter. The alleged oral statement would necessarily negate the written condition. Therefore, any testimony regarding it is inadmissible and immaterial as a matter of law. *Meadow Brook National Bank* v. *Bzura,* 20 A.D. 2d 287 (1st Dept. 1964).

Leumi Financial Corp. v. *Richter,* 17 N.Y. 2d 166 (1966), is a leading and enlightened case on this point and conclusive against the plaintiffs. The New York Court of Appeals unanimously held, at page 173:

> "The primary question is not whether Spinrad made the statements ascribed to him by defendant Richter (or whether he was authorized to make them). The rule of law which defeats defendants and makes this summary judgment valid is that which makes parol evidence inadmissible to vary the terms of a written instrument. Acceptance of defendants' version of the transaction could be accomplished only by letting Richter give oral evidence directly contradicting the clear terms of a written agreement."

What the plaintiffs attempt to prove by parol testimony is precisely the reason for which the parol evidence rule

was devised, i.e., to permit a party to a written contract to protect himself against perjury, infirmity of memory or the death of witnesses (*Fogelson* v. *Rackfay Const. Co.*, *supra,* p. 338). The writings dated December 26, 1973 are complete, clear and unambiguous. The testimony plaintiffs sought to offer that the condition was waived or satisfied would have the effect of making the written condition a nullity in the respect stated. The proffered testimony would have contradicted and negated the writing. It is therefore, as a matter of law, inadmissible and legally immaterial.

POINT III

The Statute of Frauds prohibits an oral modification of the letter agreements dated December 26, 1973.

The General Obligations Law §5-703 of New York (the Statute of Frauds) provides, *inter alia,* that:

> "An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance, in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing."

An agreement to give a mortgage on real estate is an agreement which falls within the ambit of the Statute of Frauds. Judge Cardozo, writing for a unanimous court, in the leading case on this question in New York, *Sleeth* v. *Sampson,* 237 N.Y. 69 (1923), p. 72, stated:

"A mortgage is a conveyance of an interest in real property within the meaning of section 242 (Bogert v. Bliss, 148 N.Y. 194, 199). A contract to give a mortgage is a contract for the sale of an interest in real property within the meaning of section 259. No doubt the word 'sale', when applied to such a transaction is inexact and inappropriate. Our present statute comes to us by descent from the English statute (29 Car. II, C 3, §4), which speaks of any contract or sale of land, tenements or hereditaments or any interest in or concerning them. The change of phraseology has not worked a change in meaning. One who promises to make another the owner of a lien or charge upon land promises to make him the owner of an interest in land, and this is equivalent in effect to a promise to sell him such an interest. This meaning is fixed by an unbroken series of decisions."

In accord *Williston On Contracts,* Third Edition, Vol. 3, Section 491; *Bruce Realty Co. of Fla.* v. *Berger,* 327 F. Supp. 507 (S.D.N.Y. 1971); *Sholom & Zuckerbrot Queens Leasing Corp.* v. *Forate Realty Corp.,* 29 A.D. 2d 571 (2nd Dep't 1967).

In *Donahue* v. *Manufacturers Trust Co.,* 10 M 2d 298 (Sup Ct. West. 1957) the Court specifically found that a contract to lend money secured by a mortgage on real estate is within the Statute.

Consideration of the letter agreements dated December 26, 1973, demonstrates that these writings evidenced the clear intent of the parties that LFRECC would make a $6,000,000 construction loan to G & S and a stand-by loan in the same amount, G & S in turn agreed to give a mortgage on its real estate as security for the obligation to repay the loan. The letters were the complete understand-

ing of the parties. All the material elements of the loan and mortgage, such as the amount of the loan, the term, the interest rate and the property to be mortgaged, were included in these agreements. *Bowery Savings Bank* v. *Retail Realty, Inc.*, 10 A.D. 2d 924 (1st Dep't 1960). Therefore the agreements dated December 26, 1973 satisfy the Statute and any modification thereof must be in writing.

It is equally well settled that where an agreement is within the purview of the Statute of Frauds and therefore must be in writing, the Statute of Frauds similarly renders invalid and ineffectual an oral agreement changing or modifying the terms of the written agreement. *Imperator Realty Co.* v. *Tull*, 228 N.Y. 447 (1920); *Van Iderstine Co. Inc.* v. *Barnet L. Co., Inc.*, 242 N.Y. 425 (1926); *Zelazny* v. *Pilgrim Funding Corp.*, 41 Misc. 2d 176 (Dist. Ct. Nassau 1963); General Obligations Law §5-1103.

Therefore, the plaintiffs' attempt to show by oral testimony that Pollitt allegedly told them, at the time of the execution of the commitments, the condition requiring Executive Loan Screening Committee approval had been waived or satisfied, is both inadmissible and ineffective to modify the terms of the written agreements on a subject which is within the Statute of Frauds. Plaintiffs have not offered to show any consideration for the alleged modification. Plaintiffs cannot prove a prior or contemporaneous oral modification of a contract required to be in writing. *Sleeth* v. *Sampson*, *supra; Imperator Realty Co.* v. *Tull*, supra; *Charles Albert Co.* v. *Newtown Creek Realty Corp. No. 2*, 211 App. Div. 4 (2nd Dept. 1924).

POINT IV

Defendant LFRECC is entitled to retain the $180,-000 commitment fee.

On December 3, 1973 the defendant LFRECC wrote the plaintiffs informing them that it had received its application for a loan and was prepared to make arrangements for the issuance of the commitment (19A-20A). The letter specified a number of the conditions which would be contained in the commitment. Among these conditions was the one requiring approval of the loan by the Executive Loan Screening Committee. The letter further stated that upon payment of $20,000 "which represents the non-refundable fee", LFRECC would arrange to issue the commitment letter containing the specified conditions (20A). The letter ends with the statement that unless the "acceptance and non-refundable fee" was paid by December 18, the application would be considered withdrawn. The letter was accepted and the $20,000 non-refundable fee paid to LFRECC by the plaintiffs according to the terms of this letter (8A).

On December 27, 1973, a meeting was held at LFRECC's offices at which the plaintiffs were presented with the three letters attached as exhibits to the complaint (21A-27A). These letters were the construction loan commitment (21A-23A), the stand-by commitment (24A-26A) and the transmittal letter (27A). The transmittal letter enclosed the construction loan commitment in the amount of $6,000,000 and the stand-by commitment in the same amount. The transmittal letter provided as follows:

> "Further, with respect to the enclosed letters of commitment, it is understood that in addition to all fees and expenses set forth in said commitment letters *there is due upon your acceptance of these*

> *commitments a non-refundable fee in the sum of $180,000* ($20,000 of which we now hold). Upon acceptance of these commitments by the borrower, there shall be sent to us, together with your acceptance (signed copies of these commitments), the sum of $160,000.00.
>
> It is expressly agreed and understood that *this $180,000 fee is hereby earned and should for any reason this loan fail to close, will be retained by Lincoln First Real Estate Credit Corporation as liquidated damages".* (emphasis supplied) (27A)

The defendants argued that they were entitled to retain this fee under two theories. One that it was a valid and reasonable pre-estimation by the parties of the damages that would accrue to LFRECC in the event of a default by G&S in the commitments. The defendants were and are prepared to offer testimony that this fee is reasonable and thus enforceable as a liquidated damage provision (227A-228A). The Court held in accepting defendants' alternate theory that it was the bargained-for consideration in issuing the commitments (280A). In view of this holding, the defendants had no need to put in evidence of the reasonableness of the fee.

The defendant is entitled to retain the $180,000 as liquidated damages. The parties to an agreement may agree in advance that a certain sum of money shall be deemed the measure of damages in the event of a breach. The plaintiffs are in breach of the commitments in failing to obtain the Loan Screening Committee's approval and thus in failing to close the construction loan on which the permanent commitment was conditioned. The defendant is not in breach. It has fulfilled its obligations under the commitments in submitting the loan in good faith to the Loan Screening Committee. To be sustained, the sum agreed upon as liquidated damages need only be reasonable.

In transactions of the magnitude of this size, i.e., $12,000,000, there is competition among the various lenders to make these loans. As a result of this competition, borrowers have their own bargaining positions *vis-a-vis* any particular lender. LFRECC did not have the leverage to extract an unreasonable fee for its commitments. The financial marketplace prohibited it. If G&S thought the fee was exorbitant, it did not have to accept the commitments. That it did accept them is itself evidence of the reasonableness of the fee.

Furthermore, it is customary in the real estate lending industry to charge a fee larger than this in consideration of the issuance of the commitments. *Boston Road Shopping Center, Inc.* v. *Teachers Insurance and Annuity Association of America,* 13 A.D. 2d 106 (1st Dep't 1961) *aff'd,* 11 N.Y. 2d 831 (1962) is a leading case on the right of a lender to retain the commitment fee. *Boston Road Shopping Center, Inc.* v. *Teachers Insurance and Annuity Association of America, Inc., supra,* involved an action by a borrower against a lender to recover a $22,000 commitment fee on a contemplated $1,100,000 loan. The commitment was conditioned upon the borrower's obtaining acceptable potential lessees of the project. The plaintiff was unable to obtain the lessees and sued for return of the fee. The trial court directed a verdict for the plaintiff on the ground that the plaintiff had made a good faith effort to obtain the tenants. The Appellate Division unanimously reversed the trial court and, in so doing, held that the fee was reasonable and not oppressive:

> "Nothing in the public policy of New York requires the court to strike down this payment in the nature of liquidated damages for a breach of contract by plaintiff. It is entirely reasonable in relation to the nature and extent of defendant's undertaking an arrangement; no oppression or overreaching which

> might suggest the need for equitable intervention is demonstrated." Id. p. 111.

In *Boston Road, supra,* the Appellate Division held and the Court of Appeals affirmed that holding that a liquidated damage provision of 2 points was reasonable. In the case before this Court, the liquidated damage provision involved only 1½ points.

It should be noted on this point that the plaintiffs are confused as to the nature of this fee. The plaintiffs mistakenly think that this was a "good faith" deposit which would be refunded if the loan closed. Two of the cases cited on page 27 of the plaintiffs' brief—*Regional Enterprises, Inc.* v. *Teachers Ins. & Annuity Ass'n of America,* 352 F. 2d 768 (9 Cir. 1965); and *Boston Road, supra,* involved so called "good faith deposits" which specifically provided that the fee would be returned if the loan closed. The fee paid in our case clearly stated that it was "nonrefundable" (19A, 27A). Furthermore, the two cases which deal directly with the retention of the commitment fee, *Paley* v. *Barton Savings and Loan Assn.,* 82 N.J. Super. 75, 196 A.2d 682 (1964) *cert. denied* 41 N.J. 602, 198 A.2d 446 (1964) and *Boston Road, supra,* the courts held that the lender was entitled to retain the fee. In *In Re Four Season Nursing Centers of America, Inc.,* 483 F.2d 599 (10 Cir. 1973), the court, at page 601, said that a commitment fee of 3% was not excessive and was in line with amounts being charged by lenders and, moreover, that commitment fees are a fact of financial life.

Paley v. *Barton Savings & Loan Assn., supra,* cited by the plaintiffs on p. 27 of their brief, is direct authority against them. In this the plaintiffs' assignee paid a "nonrefundable commitment fee". The loan did not close and the plaintiff sued for return of the fee. The court said, at page 687:

> "The last of plaintiffs' contentions for the propriety of entering summary judgment in their favor, that the $10,000 was an unconscionable charge and represents an unjust enrichment to defendant, cannot be sustained. There was no unjust enrichment to defendant because it performed its obligation in return for a reasonable fee. It agreed to have $1,000,000 ready to purchase from Villa Fina any mortgages which complied with the terms of the agreement, and it kept that agreement. The failure of Villa Fina to obtain any mortgages was not due to any fault on the part of the defendant. . . . The $10,000 charge was by no means unconscionable."

The Court summed up the complaint in words which have application to the present case. At p. 687 the Court concluded: "This is not an action for damages *but rather a groundless* suit for restitution of a payment made under a fully executed agreement." (emphasis suppied).

In *Shel-Al Corporation* v. *American National Insurance Co.,* 492 F2d 87 (5 Cir. 1974) the court held, in a case where the borrower was represented by an attorney at the commitment phase, that the lender was entitled to retain a $48,000 fee on a commitment for on a $1,600,000 loan (4 points) as a reasonable liquidated damage provision. At page 95, the court stated that other Courts have "unanimously" enforced stand-by clauses as a lawful manner of doing business in the mortgage financing world. The burden of proving this fee as a penalty is upon the plaintiff and it has made no offer of proof to meet this burden.

Alternatively, and as the Court correctly held, the defendant is entitled to retain the fee as earned consideration (280A). The $180,000 fee was the bargained-for consideration paid to LFRECC for LFRECC's agreement

to issue the commitments. The plaintiff knew as early as December 3, 1973 that the fee was non-refundable and that the commitments were conditioned on the approval of the Loan Screening Committee (19A-20A). The December 26 transmittal letter states unequivocally that the fee is "due" and "earned" upon acceptance of the commitments (27A). There was never any doubt that under any circumstance the fee would be retained and would not be refunded (27A & 207A). The fee was earned at the time the commitment was accepted. LFRECC's obligation was to submit the loan in good faith to the Screening Committee. There is no doubt that it did this. After this LFRECC was entitled to keep the fee.

In Re Four Seasons Nursing Centers of America Inc., supra, at p. 601 the court upheld the refusal to grant a refund of the fee on the ground that the consideration for the fee is the promise of the lender to commit a specified sum of his money for a specified time for the use and benefit of the borrower. The lender's obligation to *commit* as well as the borrower's obligation to pay a fee *in return for such commitment* is *"fixed"* as of the date the loan commitment agreement is executed (emphasis supplied), accord *Shel-Al Corporation* v. *American National Insurance Co. supra.*

It is elementary contract law that a court will not inquire into the adequacy of the consideration. "The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said is for the parties to consider at the time of the making of the agreement, and not for the Court when it is sought to be enforced". *Mandel* v. *Liebman,* 303 N.Y. 88 (1951). In essence, the plaintiff got exactly what it bargained for and the defendant is entitled to keep the money it received for the issuance of the commitments.

The final argument of the plaintiffs' brief is quite unbelievable. Plaintiff argues that the $180,000 should be refunded because the contra . lacks mutuality of obligation. The plaintiffs' complaint seeks specific performance of a *contract* (11A) and damages for the breach of a *contract* (14A). The pretrial order contains the plaintiff's contention that the agreements of December 26, 1973 were binding obligations, and sought recovery on the theory that a *contract* existed (36A); Point I of the plaintiff's trial memorandum is entitled: The Parties Entered into a Binding Commitment Contract . . . (81A); similarly is Plaintiff's Request to Charge Number 2 (108A). In the Plaintiff's Supplemental Memorandum (served on the second day of trial) the plaintiff is still arguing that the commitments were binding contracts (117A). It was not until the last day of the trial that the argument of lack of mutuality was first raised. On page 114 of the transcript, plaintiff's counsel describes his desperate attempts:

> "I confess this did occur to me almost like your bolt of lightning you spoke of this morning. I have not examined the subject. I was not prepared to address it, but it occurred to me as something which I should bring up because I think there is something wrong in our not being able to get this proof in and what's happened here in terms of the law, I think there must be something that would sustain me and I am hoping that that might be one other point made this morning in terms of is it sufficient for a Court to hold that the receipt of the $180,000 represented the earning, that they have earned it as a matter of law." (239A)

This particular bolt of lightning comes too late!

Even assuming that this argument had been raised before by the plaintiff it has no applicability here. In the plaintiff's words: "The letters of commitment sent by LFRECC constitute two separate offers to enter into contracts to provide construction and permanent loans for the Cordova project. *Acceptance by the plaintiffs in signing these agreements and paying $180,000 in consideration for the obligation of defendants to make the agreed to loan resulted in a contractual agreement binding on both parties.*" (81A).

There is no lack of mutuality here. LFRECC was bound, as of the date of acceptance of the commitments, to make the loans upon compliance with the conditions. Nothing was left to future agreement. The obligations of both sides was fixed as of the date of execution of the commitments. *In Re Four Seasons Nursing Centers of America, Inc., supra, Wilhelm* v. *Wood,* 151 App. Div. 42 (2nd Dept. 1912).

The plaintiffs' brief (29) on the question of mutuality contains a misunderstanding of what the Executive Loan Screening Committee is. Their late argument on lack of mutuality apparently rests on the theory that LFRECC controlled the Screening Committee and thus could have it turn down the loan. This is incorrect. The Executive Loan Screening Committee is comprised of 5 men none of whom are employees, officers or directors of LFRECC (221A, 225A). They are a committee of independent real estate businessmen which was established to monitor the zealousness of the mortgage officers. One is the president of a savings bank; another the former vice president in charge of real estate for one of the largest insurance companies in the country (225A). They are the voice of reason. They are not "yes" men (221A). LFRECC has no control over them. LFRECC's obliga-

tion was to in good faith submit the loan to the Screening Committee. This it did (224A-226A). There is no allegation anywhere in the pleadings or the record that LFRECC failed in any way in this obligation. There is no allegation that LFRECC influenced the Screening Committee to disapprove the loan. The plaintiffs examined several members of the Screening Committee before trial and found nothing to indicate that any undue influence was exerted on the Committee by LFRECC. There is no evidence but that the loan was disapproved on any grounds other than good objective, hard-nosed business sense (225A-226A).

POINT V

Defendant was entitled to a directed verdict and judgment on the promissory note.

On December 31, 1973, the plaintiff G & S executed a promissory note in the face amount of $300,000 payable in sixty days (13a). The note was executed by its President and attorney, Richard H. Crowe (13a). The plaintiff admits the execution of the note and receipt of the funds (34A, 43A). Furthermore, the plaintiff admits receipt of notice of the demand for payment after maturity and admits that only $50,000 of that sum has been paid (34A).

As a defense to payment of the remaining unpaid principal sum, the plaintiff contends that, by reason of certain alleged representations made by the officers of the defendant LFRECC, defendant is estopped from demanding payment and has "waived" the right to demand payment. This defense is preposterous.

The promissory note executed by G & S is an unconditional, unqualified promise to pay (13a, 282A). The time for payment has passed, demand for payment has been

made and the plaintiff has not paid. The plaintiff claims that the note is something other than which it plainly is, a promissory note. The absurd allegation is made that this loan was a *de facto* first advance under the LFRECC construction loan (Plaintiffs' Brief p. 16). If so, this would be a unique construction loan—there was no construction mortgage, no building contract, no plans or specifications, no title binder; in short, it had none of the earmarks of a real estate loan. It was not even made by or payable to the proposed construction lender, LFRECC, which issued the construction loan commitment. LFRECC, and NBW are separate and distinct entities, with their own separate board of directors and officers (5a, 35a, 142A).

The argument advanced in defense of payment is without legal merit. The plaintiffs argue in essence that the bank represented to them at the time the note and guarantees were executed that repayment would not be demanded until and if the construction loan closed (237A, 255A-256A). Parol evidence such as prior or contemporaneous statements contradicting the terms of a written instrument is, as a matter of law, inadmissible. *Meadow Brook Nat'l Bank* v. *Bzura, supra.* In *Leumi Financial Corp.* v. *Richter,* 17 N.Y. 2d 166 (1966) the defendant, on a motion for summary judgment on a promissory note, argued that certain representations regarding the time of payment were made to it at the time the note was executed, which representations allegedly contradicted the written instrument. The New York Court of Appeals held that the plaintiff was entitled to summary judgment:

> "The primary question is not whether Spinrad made the statements ascribed to him by defendant Richter (or whether he was authorized to make them). The rule of law which defeats defendants and make this summary judgment valid is that which makes parol evidence inadmissible to vary

> the terms of a written instrument. Acceptance of defendant's version of the transaction could be accomplished only by letting Richter give oral evidence directly contradicting the clear terms of a written agreement." id at 713.

The note, which G & S admits signing and receiving the proceeds of, is complete, clear and unambiguous (210A, 282A). It is an unqualified promise to pay the money NBW advanced at maturity. Parol evidence is inadmissible as a matter of law to show that the defendant waived its right to payment or is estopped from demanding payment.

Additionally, the promissory note provides that: "no waiver whatever or modification of the terms hereof shall be valid unless in writing signed by the Bank and then only to the extent therein set forth." (13a) As a result of this language, the General Obligations Law §15-301 (1) prohibits any oral modification, waiver or supplement to the terms of this note unless in writing and signed by the defendant. The plaintiffs have not offered any such writing. Therefore the alleged oral representations, even if made, would be legally ineffectual. As the Court said in *Meadow Brook Nat. Bank* v. *Bzura, supra*, at 289, such allegations are "commercially" incredible. *Chemical Bank* v. *Wasserman*, 37 N.Y. 2d 249 (1975); *Mt. Vernon Trust Co.* v. *Bergoff*, 272 N.Y. 192 (1936); *Bay Parkway Nat. Bank* v. *Shalom*, 270 N.Y. 172 (1936); *Manufacturers Trust Co.* v. *Palmer*, 13 AD 2d 772 (1st Dep't 1961).

POINT VI

The guarantors have no defense to payment and defendant was entitled to a directed verdict and judgment.

The promissory note referred to in Point V herein was unconditionally guaranteed by the individual plaintiffs, Stalnaker and Greskovich. These plaintiffs do not deny the execution of their guarantees or that the money was received (34A). They raise only the same "defenses" as the corporate plaintiff which we have already discussed.

The exact form of guaranty involved in this case was recently litigated in *National Bank of Westchester* v. *Dogwood Construction Corp.*, 47 A.D. 2d 848 (2nd Dept. 1975). In the *Dogwood* case, the guarantor of a promissory note raised the defense that certain representations were made to her at the time of her execution of the guaranty which contradicted the terms of the instrument. The Appellate Division ruled that the language of this guaranty was clear and unambiguous and constituted an unconditional promise to pay. As a result, the Court held that extrinsic evidence was inadmissible to vary, contradict or supplement the terms of the guaranty. The Appellate Division held that there were no genuine triable issues of fact raised and granted summary judgment to the plaintiff. Accord: *Mount Vernon Trust Co.* v. *Bergoff,* 272 N.Y. 192 (1936).

The rule of *Dogwood* was even more recently approved by the Court of Appeals in *Chemical Bank* v. *Wasserman,* 37 N.Y. 2d 249 (1975), *affirming* 45 A.D. 2d 703 (1st Dept. 1974). In the *Chemical Bank* case, the Court of Appeals held that the defendants could not avoid their guaranty to the plaintiff, evidenced by a written instrument, by

claiming that there was an oral representation or promise on the part of the plaintiff not to enforce the guaranty according to its terms. The Court stated:

> ". . . [An] oral agreement cannot operate to terminate appellants obligation and does not create a triable issue of fact." Accord: *Meadow Brook Nat. Bank* v. *Bzura, supra.* id at 251.

The defendant was entitled to a directed verdict and judgment against the individual guarantors on their guarantees.

POINT VII

The doctrine of equitable estoppel has no applicability to the letter agreements dated December 26, 1973.

In order to invoke the doctrine of equitable estoppel in New York, the party claiming the benefit of the rule must allege and prove the following elements: (i) fraudulent representation or a fraudulent omission of material fact, (ii) an intention that the other party will rely on such representation and (iii) detrimental reliance by the other party. The key element in the doctrine of equitable estoppel or estoppel *in pais* is either *actual fraud* or *constructive fraud* resulting from gross negligence. 21 N.Y. Jur. *Estoppel* §26, at 36, *Rothschild* v. *Title Guarantee & T. Co.,* 204 N.Y. 458 (1912).

It is a general rule that an estoppel *in pais* must be strictly pleaded in that all the elements and facts necessary to constitute it must be set out in the pleading with precision, certainty, accuracy and particularity. The plea in estoppel must be certain in every particular, and must allege every material fact which the pleader expects to

prove or upon which the estoppel is predicated. 28 Am. Jur. 2d *Estoppel and Waiver,* §141, at 815-816. In the words of Judge Cooper "If that's the case; you say it and you charge it." (187A)

A reading of the pleadings, the pre-trial order and the plaintiffs' trial memorandum, show that they are devoid, absolutely devoid of fraud, actual or constructive (281A). The oft repeated words of plaintiffs' counsel during the trial are the best evidence that no fraud was pleaded here or is involved here. At 177A:

> "Here we are not talking about a fraudulent statement. Mr. Pollitt, we believe, was told that it was approved . . .".

At 187A, Mr. Targoff says: "Your Honor, we didn't bring a case for fraud here."

At 195A Mr. Targoff says: "No issue of fraud is claimed your Honor".

The pleadings raised no issue of fraud. Fraud in New York cannot be presumed. *Wilhelm* v. *Wood, supra.* The burden of proving fraud is on the party asserting it. It must be established by clear, positive and convincing evidence. *Karpas* v. *Brussel,* 217 App. Div. 550 (1st Dept. 1926). The general rule is that fraud "which is criminal in its essence" and involves moral turpitude at least is never presumed, but must be affirmatively proved . . . (and) must be established by clear and convincing proof . . . *Marcus* v. *Marcus,* 194 Misc. 464, at 469-470 (Sup. Ct. Kings 1949). Where a transaction is capable of two constructions, one of which is honest and the other is fraudulent or where the facts are equally consistent with honesty and with fraud, fraud will not be presumed and the transaction should be held honest. *Jones* v. *Burton,* 9 Misc. 2d 354 (Sup. Ct. Kings, 1957).

Since fraud is the key element of equitable estoppel and is not pleaded or claimed and cannot be presumed, the doctrine of equitable estoppel has no applicability here.

The claim of equitable estoppel was not raised until the second day of the trial when the plaintiff submitted his supplemental memorandum (167A, 172A). Notwithstanding the fact that plaintiffs' attorney said in open court:

> "We were told certain things. We relied on them and we borrowed and spent $300,000. That's the heart of our case in terms of our right to damages. That's where I raise that issue [equitable estoppel] I confess that that's my emphasis, it was the emphasis in the brief, it was the emphasis in the request to charge, because I am aware of the law which Mr. O'Keefe says and the difficulty for a borrower to establish that the failure to lend money causes him damages, so I realized where I can't show it on the basis of what I call equitable estoppel; that's what the heart of my attack was going to" (220A).

Plaintiffs' brief on appeal now claims he was claiming equitable estoppel on the commitment agreements. We believe it's too late for plaintiffs' counsel to raise this, his own above quoted words are a waiver of this argument. Notwithstanding this and notwithstanding that there is no fraud in the case we will discuss why the doctrine of equitable estoppel is inapplicable.

As argued in Point I of this brief, a contract to lend money secured by a mortgage on real estate is within the statute of frauds and thus requires a writing to modify or change the terms. Therefore, the N.Y. Court of Appeals held, the doctrine of equitable estoppel may not be in-

voked to give effect to parol oral representations or promises. *Scheuer* v. *Scheuer,* 308 N.Y. 447, at p. 451 (1955).

Furthermore, the commitments dated December 26, 1973 are integrated binding contracts and parol evidence of any prior or contemporaneous statements are barred by the parol evidence rule. Knowing the effect of this rule, the plaintiffs claimed, on the last day of the trial, that there were representations made *after* acceptance of the commitments and after the payment of the commitment fee (251A). Judge Cooper was so incensed by this tactic that he wrote a letter to the attorneys and made it a part of the record (287A). That letter makes clear that this was the first time any such issue was raised. Plaintiffs' attorney, aware of his difficulty with the parol evidence rule, made a desperate attempt to evade it by claiming at the eleventh hour that representations were made after the acceptance of the commitments upon which plaintiff relied. This is of no avail. Besides the fact that fraud is an element of equitable estoppel and there is no fraud here, another element is reliance. It is logically impossible to argue, as plaintiffs do, that they relied on statements made *after* the acceptance of the commitments and payment of the non-refundable fee and based upon such representations were induced to accept the commitments and pay the fee which they had already done. *Imperator Realty Co.* v. *Tull,* 228 N.Y. 447 (1920) is not controlling.

The plaintiffs' claim for the applicability of the doctrine of equitable estoppel is based wholly on the case of *Imperator Realty Co.* v. *Tull,* 228 N.Y. 447 (1920). This reliance is totally misplaced. The holding of *Imperator Realty Co.* v. *Tull, supra* is found in the majority opinion delivered by Judge Chase and not the concurring opinion of Judge Cardozzo.

From this decision it is clear that to invoke the doctrine of equitable estoppel in a situation where the Stat-

ute of Frauds is applicable, the following items must be present:

1) there must be a subsequent agreement;

2) there must be consideration for the subsequent agreement;

3) the new oral agreement must not be inconsistent with any material parts of the prior written agreement; and,

4) the party claiming the estoppel must have performed or omitted performance of his obligation under the written agreement based upon his reliance on the oral agreement.

Albert Co. Inc. v. *Newtown Creek Realty Corp. No. 2,* 211 App. Div. 4 (2d Dept. 1924); *British Supreme Clothes Ltd.* v. *Futura Fabrics Corp.,* 34 AD 2d 642 (1st Dept. 1970), aff'd 28 N.Y. 2d 727 (1971). In each of these prerequisites, the plaintiffs' argument is lacking. There is no clear subsequent agreement. Plaintiffs say one thing, defendants deny that it was said. On this point, the New York courts hold that the alleged new agreement must be shown by the acts of the party claiming the estoppel which unequivocally point to the new agreement. These acts must be such that they would be *incomprehensible* or at least *extraordinary* except on the supposition that the agreement was made. *Burns* v. *McCormick,* 233 N.Y. 230 (1922); *LaRosa* v. *Matthews,* 28 Misc. 2d 929 (Sup. Ct. Nassau 1961). In this regard and in regard to the fourth element of the doctrine, the plaintiff can point to no such act or omission on its part after the acceptance of the written agreements. Furthermore the condition which it claims LFRECC is estopped from enforcing was not to be performed by it but by LFRECC in submitting the loan to the Screening Committee which it unquestionably did.

The second element of the doctrine is that there must be consideration for the new agreement. Plaintiff neither pleads nor offers any such consideration and indeed there is none possible. Since the commitments were already accepted and the commitment fee paid *prior* to the alleged oral agreement, what possible benefit could LFRECC derive from deleting or waving the condition requiring approval. The third element of estoppel in *pais* in that the new oral agreement must not be inconsistent with any material part of the written agreement. There can be no doubt that the alleged oral agreement deleting the approval condition is inconsistent with the written agreement requiring such a condition; if this is not inconsistent then inconsistency has no meaning.

Lastly, the condition requiring the approval of the Screening Committee is a material element of this contract. LRFECC's operating policy requires that all loans of this size be submitted to and approved by the Loan Screening Committee. Plaintiff was aware how crucial this condition was as early as the first communication from LFRECC to G & S, i.e. the December 3, 1973 letter acknowledging receipt of the loan application (19A) (Exhibit A to complaint). Any doubt as to the materiality of this condition is dispelled by the *Albert Co. Inc.* v. *Newtown Realty Corporation No. 2, supra.*

Albert Co. Inc. v. *Newtown Creek Realty Corp., No. 1* and *No. 2*, 211 App. Div. 1 and 4 (2d Dept. 1924) is the controlling case and more analagous to the facts of this appeal then *Imperator Realty Co.* v. *Tull, supra. Albert Co. Inc.* v. *Newtown Creek Realty Corp., supra,* involved a contract for the sale of real property. The plaintiff sought (i) reformation of the contract striking out a provision requiring that the French government approve the sale; (ii) specific performance; (iii) injunction; and (iv) damages. The plaintiff alleged that he attended an

auction sale. The auctioneer publicly announced that it would be an unreserved auction but that prior to bidding, was assured that written approval of the French government would be furnished the plaintiff if it was the highest bidder. The plaintiff alleged that it was informed the approval clause was a mere formality and would be waived. Plaintiff, relying on these representations, was the highest bidder. When the contract was presented to it, it contained the approval clause. The Plaintiff objected and was told that if it signed the contract and paid the down payment, the defendant would either obtain the approval or procure the waiver. Plaintiff signed the contract and paid the down payment without incorporating the alleged oral agreements into the contract. The plaintiff in its second cause of action alleged that immediately *after* signing the contract it was mutually agreed that the contract be modified by eliminating and disregarding the condition requiring approval of the sale by the French government. The approval of the French government was not obtained and the defendant seller refused to close the transaction. The plaintiff sued and the defendant moved to strike the complaint for failure to state a cause of action. The motion was denied and the defendant appealed. On appeal, the prior order was reversed and the complaint dismissed. The Appellate Division held, assuming as it had to on a motion of this sort, that the representations were fraudulently made, but that the complaint failed to state a cause of action. The contract could not be reformed. The Court said at page 4:

> "Plaintiff knew that the clause in question was in the contract which it signed and it well knew what the effect of the clause was. It cannot, therefore, in my opinion, under the authorities claim to reform the contract by striking out that clause on the ground of mistake on its part and fraud on the part of the defendant."

The Court in *Albert Co. Inc.* v. *Newtown Creek Realty Corp., No. 2, supra,* in deciding the defendants' motion to dismiss the action because the contract was within the Statute of Frauds, held the alleged oral agreement occurring after the written contract could not be proved. In so holding, it expressly rejected the plaintiff's argument that *Imperator Realty Co.* v. *Tull supra* was the controlling case. The Court, at page 7, after assuming that there was consideration for the alleged oral agreement, read *Imperator Realty Co., supra,* as being applicable only to a situation where the oral contract was *not inconsistent* with *any material* part of the written contract. The Court stated, in distinguishing *Imperator Realty Co.* v. *Tull, supra,* and in using the language of the *Imperator* decision:

> "But the oral contract here affected something more. The written contract of sale was upon condition it have the written approval of the French government. The oral agreement destroyed this condition and made the sale absolute. This, in my opinion, was clearly 'inconsistent' with a 'material part of the written contract' and did plainly 'substitute a new oral contract' for an absolute sale in place of the 'material part of the written contract' for a conditional sale". p. 7.

POINT VIII

The doctrine of equitable estoppel has no applicability to the promissory note and guarantees.

On or about December 31, 1973 G & S Development Corporation, acting through its president and attorney Crowe, executed a promissory note in the amount of $300,000.00 in favor of the National Bank of Westchester (43A, 13a). On January 3, 1974 G & S received the sum of $300,000.00 (43A). This bank note was personally guaranteed by the individual plaintiffs Stalnaker and Greskovich (acting by his attorney-in-fact Mr. Crowe) (10A, 16a-25a). On or about April 19, 1974, after maturity of the promissory note, NBW made demand upon G & S for repayment of the $300,000.00 promissory note. Notice of the demand was also made upon the individual guarantors (34A). Plaintiff as its defense to the note claims that it was "induced" to execute the note and the individual guarantees on the alleged oral representation that repayment would not be demanded unless the construction loan was made by LFRECC (220A, 237A, 255A-256A). Although plaintiffs' attorney is not certain who made the representations (at 220A and 255A, he says the representation was made by Dr. Stalmaker acquiesced in *silence* by Mr. Kuhn; at p. 37 of his brief he argues that the representations were made by LFRECC—a curious argument since the loan was made by NBW and not LFRECC) it makes little difference for the alleged representation is both commercially incredible and legally inadmissible (Point II p. 16).

The doctrine of *estoppel in pais* requires 4 elements, none of which are satisfied here. Firstly, *Imperator Realty Co. v. Tull, supra,* requires a *subsequent* oral agreement based upon consideration. Here the alleged representation occurred *prior* to the signing of the promissory

note and guarantees (16A, 43A, 255A) and consideration is neither alleged nor existing. There can be no doubt but that the condition of repayment is the most material part of the note. Furthermore, there is absolutely no allegation of fraud as to the note and guaranty. The last element of the doctrine, i.e. detrimental reliance is totally lacking. In response to Judge Cooper's questioning, plaintiff's attorney stated what the alleged detriment was at 220A: "The hurt was we borrowed money". It is incredible to me that one could argue he was "hurt" by being induced to borrow $300,000 and because of this egregious "hurt" is exonerated from repaying the money. Furthermore the idea of reliance requires a change in position *after* the representation. Here there was no such change. The plaintiffs were not coerced into borrowing $300,000. It *wanted* the money, at least in part, to pay for obligations it had incurred *prior* to the borrowing. In plaintiff's attorneys opening remarks in which he speaks of the December 27, 1973 meeting, the plaintiff's attorney states:

> "We are dearly in need of this money. We have to pay some people off who have already started working for us. We need it to do it, so the people will continue working for us. They already started construction. They had to." (144A)

At 142(A) he states:

> "They really wanted the money before the end of 1973. It is important to them for tax reasons to get started. Mostly for tax reasons".

At 174(A) he states the entire $300,000 was spent by January 15, 1974—15 days after the papers were signed. To claim equitable estoppel on these facts is to make a mockery of the doctrine.

CONCLUSION

The judgment appealed from should in all respects be granted.

Respectfully submitted,

McCarthy, Fingar, Donovan & Glatthaar
Attorneys for Defendants-Appellees

Robert M. Redis
Raymond P. O'Keefe
Of Counsel

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT

U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

G & S DEVELOPMENT

VS

LINCOLN FIRST REAL ESTATE

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

BERNARD S. GREENBERG being duly sworn, deposes and says that he is over the age of 21 years and resides at 162 E 7th st, , NY, NY

That on the 10th day of feb, 1977 at

he served the annexed bri3f for defendants-appellees and supplemantal appendix upon

Willkie Farr & Gallagher, One Chase Manhatten Plaza, NY, NY

in this action, by delivering to and leaving with said attorneys two true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 10th

day of Feb, 1977

Bernard S Greenberg

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977